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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 697

WILLIAM C. McDOUGALL, PETITIONER

v.

UNITED STATES CIVIL SERVICE COMMISSION, INDIVIDUALLY AND OFFICIALLY, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court for the District of Columbia filed no opinion. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 59A-61A) is reported at 202 F. 2d 361.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1953 (R. 62A). The petition for a writ of certiorari was filed on April 2, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner who, for physical reasons, received a "Discharge from Draft" thirteen days following his induction but before being finally accepted and enrolled in the military service, may be considered as having "served on active duty" within Section 2 of the Veterans' Preference Act of 1944, and accordingly entitled to employment preference under that Act.

STATUTE AND REGULATIONS INVOLVED

Section 2 of the Veterans' Preference Act of 1944, 58 Stat. 387-388, as amended, 5 U.S.C., Supp. V, 851, and pertinent World War I Selective Service Regulations are set out in the Appendix, *infra*, pp. 9-13.

STATEMENT

Petitioner was notified on April 7, 1950, that because of a reduction in force he was to be furloughed, effective August 1, 1950, from his position in the Regional Office of the Veterans Administration (R. 22A-23A). For reduction in force purposes, petitioner requested the Civil Service Commission to rule that he was entitled to veterans' preference. This request was denied, and the denial was affirmed by the Board of Appeals and Review of the Civil Service Commission. (R. 24A-25A.)

Thereafter petitioner instituted this suit in the District Court against the Civil Service Commission and its members (R. 2A-6A), seeking a declaration that he was entitled to preference eligibility under § 2 of the Veterans' Preference Act of 1944. His claim is based upon a period of thirteen days'

service commencing with his induction on June 15, 1918, by his local board at Pittsburgh, Pennsylvania (R. 37A-38A) and culminating in his "Discharge from Draft" on June 28, 1918, at a mobilization camp in Virginia (R. 6A-7A) where he was found physically unfit for military service because of defective vision and a missing index finger. (R. 6A-7A).[1]

The District Court sustained respondents' motion for judgment on the pleadings (R. 57A-58A) and the Court of Appeals affirmed (R. 59A-62A).

ARGUMENT

Petitioner claims to be entitled to the employment preference accorded to ex-servicemen by Section 2 of the Veterans' Preference Act of 1944, 58 Stat. 387-388, as amended, 5 U.S.C., Supp V, 851, Appendix, *infra*, p. 9. Except for immaterial factual distinctions, the claim presented is analogous to that considered and rejected by this Court in *Mitchell* v. *Cohen*, 333 U.S. 411; and the relief which petitioner seeks is comparable to that sought and denied in *Patterson* v. *Lamb*, 329 U.S. 539. The Court of Appeals, relying upon these decisions, affirmed the judgment of the District Court. This decision is clearly correct, and no question of general importance meriting review by this Court is presented.

Like thousands of others petitioner received the

[1] Petitioner's request that he be issued a "Discharge from Military Service" in lieu of the "Discharge from Draft" was denied by the Army Board on Correction of Military Records on November 8, 1950 (R. 38A-44A).

call to military service in accordance with the World War I Selective Service Act, 40 Stat. 76. He was inducted on June 15, 1918, at Pittsburgh, Pennsylvania, and was sent to a mobilization camp at Camp Humphreys, Virginia; thirteen days later, he was found to be physically unfit for a military duty, was rejected, and was issued a Discharge from Draft, and he then returned to his home.[2] On the basis of these facts, petitioner contends he qualifies as an ex-serviceman who has served on active duty and is entitled to the benefits of the Veterans' Preference Act of 1944, Section 2 of which established a preference in government employment for "those ex-servicemen and women *who have served on active duty* in any branch of the armed forces of the United States, during any war * * * and have been separated therefrom under honorable conditions." (Emphasis supplied.)

The preference accorded by Section 2 of the Act thus applies only to those "ex-servicemen * * * who have served on active duty," and this Court has defined the term "ex servicemen", for purposes of the statute, "as relating only to those who performed military service on full-time active duty * * *" *Mitchell* v. *Cohen, supra* at p. 421. The thirteen days' service upon which petitioner here relies consists of nothing more than time which elapsed between his induction by the local board and his ultimate rejection by the military authorities—time

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[2] Discharge from Draft, Form No. 638, A.G.O. was used "for discharge of aliens and alien enemies and of men rejected on account of physical unfitness, dependency, etc." (R. 7A).

consumed by the selective service process. In no sense of the word was it "active" military duty.[3] See *Patterson* v. *Lamb, supra;* cf. *Falbo* v. *United States,* 320 U.S. 549, 553.

That active duty did not commence prior to final acceptance and enrollment by the military authorities is substantiated by the fact that Congress found it necessary to enact special legislation in order to extend to inductees the insurance and disability benefits provided for military personnel in "active service" by the War Risk Insurance Act of 1917.[4] Thus, the 1917 Act was amended by the Act of December 24, 1919, 41 Stat. 371, § 7 of which provided:

> That if after induction by the local draft board, *but before being accepted and enrolled for active service,* the person died or became disabled as a result of disease contracted or injury suffered in the line of duty * * * he or those entitled thereto shall receive the benefits of compensation payable under Article III: *Provided,* That any insurance application made by a person after induction by the local draft board but before being accepted and enrolled for *active service* shall be deemed valid. [Emphasis supplied.]

The committee report accompanying the amendment clearly indicates that service after induction

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[3] Selective Service Regulations, 174, 177, 178, Appendix, *infra,* pp. 9-13.

[4] 40 Stat. 409, §§ 400, 401.

but prior to final acceptance and enrollment was not regarded as active service.[5]

In substance, the 1919 Amendment appears in § 24 of the World War Veterans Act, 43 Stat. 614, 38 U.S.C. 448; and Congress further recognized that active service commences only after final acceptance by the military authorities in the Act of June 28, 1934, § 1, 48 Stat. 1281, as amended, 38 U.S.C. 503, which provides certain benefits to surviving widows and children of "any deceased person who served in World War I;" a "person who served" is defined in § 3 (38 U.S.C. 505) as one "who was finally accepted for active service in the military or naval forces of the United States."

In addition, the Veterans Administration and its predecessor, the Veterans Bureau, have consistently held that an inductee not finally accepted and enrolled is not an "ex-serviceman" where veterans benefits are made available or payable to the "ex-servicemen,"[6] or where compensation for an in-

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[5] "Section 7 as amended adds a new section to the war-risk insurance act which is designed to dispose of the so-called "inducted" man problem. This section declares that a person is not in active service within the meaning of the war-risk insurance act until he has been examined at the camp or other place of mobilization and "accepted and enrolled for active service." The first proviso covers the case of men who are injured in line of duty, etc. after induction and prior to final acceptance, and the second proviso covers cases where an inducted man makes an application for insurance prior to being finally accepted." Sen. Rep. No. 339, 66th Cong., 2d Sess., p. 2.

[6] *E.g.* Administrator's Decision, Veterans Administration, No. 46, April 20, 1931, involving § 2 of the Act of July 3, 1930, 46 Stat. 1016, amending § 200 of the World War Veterans Act of 1924, 38 U.S.C. 471, which authorized disability benefits for "any ex-serviceman who entered the service prior to November 11, 1918 * * * who is * * * suffering * * * permanent disability * * *."

jury is contingent upon the injury having been received in the "active service."[7] This long-applied administrative interpretation is, of course, entitled to great weight. *United States* v. *Henning,* 344 U.S. 66, 75; *United States* v. *Zazove,* 334 U.S. 602; *United States* v. *Citizens Loan Co.,* 316 U.S. 209, 214.

Hurley v. *Crawley,* 60 App. D.C. 245, 50 F. 2d 1010, relied upon by petitioner (Pet. 4-5), decided only that the holder of a Discharge from Draft certificate was an "honorably discharged soldier" within the meaning of the term as used in Civil Service Rule VI which accorded preference to "honorably discharged soldiers, sailors, and marines." Whether he had served on active duty was a question not involved under the law then in effect.

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[7] *E.g.* Administrator's Decision, Veterans Administration, No. 58, June 6, 1931, involving § 202 of the World War Veterans Act of 1924, as amended, 38 U.S.C. 473, providing for compensation "to any person who suffered the loss of the use of a creative organ or one or more feet or hands as the result of an injury received in the *active service* in line of duty between April 6, 1917, and November 11, 1918 * * *." Cf. Administrator's Decision, Veterans Administration, No. 635, February 28, 1945.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY, 1953.

APPENDIX

1. Section 2 of the Veterans' Preference Act of 1944, 58 Stat. 387-388, as amended, 5 U.S.C., Supp. V, 851 provides in pertinent part as follows:

> In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, * * * of the Government, * * * preference shall be given to * * * (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, * * * and have been separated therefrom under honorable conditions; * * *

2. Selective Service Regulations (II Selective Service Rules, Regulations and Instructions, 1917-1919, War Department, Office of Provost Marshal General) read in relevant part as follows:

> Sec. 1(n). The term "selected man" shall include all registrants who, under the pre-existing regulations had been notified of selection (old Form 164-B) or who, under these Regulations, have been notified by their Local Boards to report for military duty and entrainment. (Form No. 999, as amended, C.S.S.R. No. 2. January 25, 1918.)
>
> Section 157. *The order and notification of induction into military service.*
>
> The Provost Marshal General is charged with the mobilization of selected men and with all matters relating to their assembly, entrainment, and transportation up to the time they

arrive at a mobilization camp and including supervision of the preparation of schedules for entrainment and transportation. The Provost Marshal General shall notify each State Adjutant General to furnish, at a specified time or times and place or places, the net quota of the State or any proportion or part thereof; whereupon the Adjutant General of the State shall notify each Local Board of the exact number of selected men to be furnished by such Board, and of the date, place, and hour of entrainment. Upon receipt of this notification from the Adjutant General of the State, the Local Board shall enter in column 24 on the Classification List, after the name of each registrant to be called for entrainment, the day and hour on which the registrant is to report to the Local Board, which day and hour must be not more than 24 nor less than 6 hours in advance of the time set for entrainment.

Immediately upon making such entries in column 24 of the Classification List opposite the name of each such registrant the Local Board shall mail to the last-known address of each such registrant an order (Form 1028, including Form 1028A) to report to the Local Board for military duty at the hour, day, and place specified in said order, which hour and day shall be the same as that stamped or written in column 24 of the Classification List after the name of such registrant. From and after the day and hour thus specified each such registrant shall be in the military service of the

United States, and either the entry of such date after the name of any such registrant on the Classification List or the mailing to any such registrant of the order into military service as provided in this paragraph shall constitute the giving of notice to such registrant that from and after such day and hour he will be in the military service of the United States, and of his duty to report to the Local Board at the hour and on the day specified.

Orders to report to a Local Board for military duty (Form 1028) should be issued in ample time for selected men to compose their affairs before leaving home.
(Form No. 999).

Section 174. *Credit Cards (Form 1029 A and B) of Selected Men to Be Completed at Military Camps or Stations.*

Upon arrival at the military camp or station, the adjutant shall take charge of all papers delivered to him by the leader of the party of selected men. Upon the receipt by mail of Form 1029 the adjutant shall enter a crossmark (X) in column 7 thereof, both original and duplicate, opposite the name of any member of the party who has failed to report at the military camp or station, and will indorse the reverse side thereof, will mail the original to the Provost Marshal General and the duplicate to the proper Local Board. Each Form 1029 A and B shall be retained by the adjutant until final acceptance or rejection of the man concerned, when Form 1029 A shall be completed and returned to the proper Local Board.

Form 1029 B will be completed and mailed direct to the Provost Marshal General. No Form 1029 A or 1029 B will, in any case, be retained longer than one month from the date of induction into military service of the selected man concerned. (Form No. 999 as amended C.S.S.R. No. 1. January 21, 1918).

Sec. 177. *Dispostion of Men Rejected or Discharged from Military Service at a Military Camp or Station.*

When any selected man is rejected at a military camp or station, the commanding officer thereof will promptly notify his Local Board of the fact, cause, and date of rejection, using Form 1029-A, and the Provost Marshal General using Form 1029-B. When any selected man is, subsequent to acceptance, discharged at a military camp or station the commanding officer thereof shall similarly notify the Local Board (Form 1029-C) and the Provost Marshal General (Form 1029-D).

If the rejection or discharge is on account of the fact that the registrant is an alien, or an alien enemy, or that he is physically disqualified for general military service, the Local Board shall place the registrant forthwith in Class V. If the discharge or rejection is on account of dependency or any other cause for deferred classification prescribed by these regulations, the Local Board shall proceed to reclassify the registrant in accordance with his status as determined by the action of the mili-

tary authorities in discharging him. (Form 999, as amended C.S.S.R. No. 1. January 21, 1918)

Section 178. *Account of Quotas to be Kept at the Office of the Provost Marshal General.*

The Provost Marshal General shall keep the account of quotas of all local boards. Only men actually reporting and finally accepted for military service shall be credited to the accounts of local boards. Credit shall be allowed as of the date of acceptance by the military authorities in each case. (Form 999 as amended, C.S.S.R. No. 1. January 21, 1918)

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